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No. 95-568

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

In the Matter of S. SIMPSON GRAY, a Disbarred Attorney, For Reinstatement to the Bar of the State of New York,

Petitioner,

against

STATE OF NEW YORK GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

and

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT COMMITTEES ON CHARACTER AND FITNESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMITTEES ON CHARACTER AND FITNESS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Question Presented

Whether this Court should grant certiorari to determine the contours of the asserted right of petitioner, a disbarred New York attorney denied reinstatement to the practice of law, to procedural due process on his petition for reinstatement, when petitioner received a full evidentiary hearing before the Committee on Character and Fitness of the Appellate Division, Second Department, and the multiple reasons for the denial of reinstatement arose from his presentation of evidence that persuaded the Committee to recommend to the Appellate Division that petitioner had failed to carry his burden of proving by clear and convincing evidence that he had the requisite character and fitness to be reinstated to the practice of law.

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Statement of the Case

Petitioner S. Simpson Gray was convicted in New York State on three counts of grand larceny in 1985. He was sentenced to five years probation and two thousand hours of community service, and was required to make restitution of approximately $16,000 to clients who had been injured through his misuse of their funds. He was subsequently disbarred from the practice of law by the Appellate Division, Second Department. *See, Matter of Gray*, 113 AD2d 500 (2d Dept 1985).

In 1993, petitioner moved in the Appellate Division for reinstatement as an attorney. The Appellate Division referred the matter to its Committee on Character and Fitness for investigation and report as to petitioner's fitness to practice law. On March 11, 1994, petitioner received a full hearing before the Committee, at which he offered sworn testimony and was given an opportunity to present evidence of his current character and fitness, including his compliance with the requirement that he make restitution. He testified that "[m]y restitution balance is still about $5,300, but, upon information and belief, all three of the complaining witnesses in the criminal trial were paid this balance by the Client Fund." Shortly after the hearing, the "Client Fund" -- that is, the Lawyers Fund for Client Protection of the State of New York, which is charged with providing restitution to clients victimized by their lawyers -- advised the Committee by letter that the Fund "ha[d] provided nine awards totalling $8,928 to [petitioner's] former clients" but "ha[d] received no restitution" from petitioner.

On June 17, 1994, the Committee issued a report to the Appellate Division, unanimously recommending that petitioner be denied reinstatement. The Committee offered six separate reasons for this recommendation: Petitioner's failure to satisfy

certain complaints against him as an attorney in Pennsylvania; his failure "to fully comply" with the restitution requirement of his larceny conviction; his indebtedness of $12,000 to a former landlord, as to which petitioner professed to be "unsure whether this indebtedness has been cancelled by his bankruptcy proceedings"; his failure to notify his clients of his disbarment, as required by Appellate Division rules; his receipt of an attorney's fee after his disbarment without prior Court approval; and "[t]he questionable ethics involved in [his] conduct [as a real estate broker] subsequent to his disbarment."

On November 17, 1994, the Appellate Division denied petitioner's motion for reinstatement, finding that he "does not demonstrate the requisite fitness and character and fitness [sic] to practice law." Petitioner then moved in the Appellate Division for reargument or for permission to appeal to the New York Court of Appeals. This motion was denied on March 29, 1995. The New York Court of Appeals, on July 5, 1995, likewise denied petitioner's motion for leave to appeal.

REASONS FOR DENYING THE WRIT

Petitioner was not denied any due process rights in the course of proceedings on his application for reinstatement.

The hearing accorded petitioner by the Committee on Character and Fitness of the Appellate Division, Second Department provided all the process that might conceivably be due petitioner on his application for reinstatement as an attorney. The present case neither creates a conflict among decisions nor raises any question that the Appellate Division's procedures are constitutionally inadequate.

Petitioner first erroneously suggests that there is a conflict between the decisions of this Court and the New York Court of Appeals. This Court has held that a State cannot exclude an applicant from the practice of law "in a manner or for reasons that contravene Due Process." *Willner v Committee on Character and Fitness*, 373 US 96, 102 (1963); *Schware v Board of Examiners of State of New Mexico*, 353 US 232, 238 (1957). At least one other court has found due process protections specifically applicable to disbarred attorneys seeking readmission to a state bar, as well as to first-time applicants. *See*, *Brooks v Fairfield County Committee on Recommendations for Admission to the Bar*, 409 F Supp 47, 50 (D Conn 1976).

In dictum, the New York Court of Appeals commented that an attorney who has been "disbarred for professional misconduct or commission of a felony" cannot claim a right to reinstatement that is hedged about with due process protections, for "[t]he disbarred attorney has been granted" the property right to practice of law that is protected by due process, "but has been proven unfit because of some violation of the public trust." *Matter of Rowe*, 73 NY2d 336, 338 (1989). *Rowe*, however, did

not involve a disbarred attorney. Rather, it involved "[a]n attorney suspended because of mental disability," whom the Court distinguished from a disbarred attorney by virtue of "retain[ing] a property interest in his license during the period of suspension" and who in fact was held to be entitled by due process to a hearing to resolve questions of fact regarding his reinstatement. 73 NY2d at 338-339. Neither *Rowe* nor any other New York case has ever held that a disbarred attorney is not entitled to a hearing or other due process protection upon an application for reinstatement. Nor, it appears, has such a hearing ever actually been denied in New York to disbarred applicants. Thus, the supposed "conflict" on which petitioner bases his petition is nonexistent.

Nor was petitioner himself denied the right he asserts. He appears to suggest ("Questions Presented," Petition, p. i) that he is aggrieved by the denial of a hearing. It is undisputed, however, that he received a full evidentiary hearing before the Committee on Character and Fitness, at which he offered his own testimony, submitted documentary evidence, and had the opportunities (though he did not avail himself of them) to be represented by counsel and present other witnesses. He cannot complain of any constitutional deficiencies in the hearing he received. Petitioner likewise is not aggrieved by the fact that the Appellate Division, Second Department did not offer him a *de novo* hearing on the question of his reinstatement. One full hearing is constitutionally sufficient.

Nor, finally, was the Committee's recommendation somehow tainted by its reliance on a letter to the Committee from the Lawyer's Fund for Client Protection. First, petitioner's failure to reimburse the Fund for its restitution to his cheated clients was only one of six separate bases for the Committee's recommendation. More importantly, the precise issue discussed in the Fund's

letter was the subject of substantially corroborative testimony by petitioner himself. According to petitioner, he owed the Fund "about $5,300"; in the Fund's view, his liability was $8,928. The exact amount in question is hardly material and certainly cannot form the basis of a claim that the actual hearing was defective or that a new hearing is required.

Petitioner was obliged to make a showing "by clear and convincing evidence that he has fully complied with the provisions of the order disbarring * * * him * * * and that he possesses the character and general fitness to practice law." 22 NYCRR §691.11(b)(1). He was accorded a full evidentiary hearing at which to make the necessary showing. With or without the supposedly "ex parte" letter of the Fund for Client Protection, he failed to do so. He cannot now complain that the procedures employed by the State of New York in reaching this conclusion did not afford him due process of law.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
November 7, 1995

Respectfully submitted,
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